(8)

Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL GILBERT NEAL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE NATIONAL ASOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

PETER GOLDBERGER*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

RONALD F. WRIGHT
Wake Forest University
School of Law
P.O. Box 7206
Winston-Salem, NC 27109
(910) 759-5727

BARBARA E. BERGMAN
University of New Mexico
School of Law
1117 Stanford, N.E.
Albuquerque, NM 87106
(505) 277-3304

Attorneys for Amici Curiae

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Should federal courts, when interpreting the statute establishing a mandatory minimum sentence for crimes involving more than a specified weight of LSD, calculate the weight of the "mixture or substance" in a manner consistent with the expert view of the Sentencing Commission regarding the most fair and rational meaning of this statutory language?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE SENTENCING COMMISSION'S INTERPRETATION OF THIS STATUTORY LANGUAGE REFLECTS A POLICY DETERMINATION DESERVING JUDICIAL DEFERENCE 5

A. Congress did not select a particular method for calculating the weight of the carrier medium for LSD 8

B. Federal courts should look to administrative bodies with delegated policymaking authority for guidance on statutory construction questions that amount to policy choices 10

II. THE EXPERIENCE OF THE SENTENCING COMMISSION AND ITS ABILITY TO COORDINATE SENTENCING POLICY MAKE IT THE BEST SOURCE OF GUIDANCE FOR A COURT INTERPRETING THIS SENTENCING STATUTE 16

A. The Commission's responsibility to monitor all federal sentences for drug offenses puts it in a unique position to guard against unfair disparities in sentences 18

TABLE OF CONTENTS – Continued

Page

B. A coordinating role for the Commission is especially important in sentencing, where Congress emphasized an integrated approach 21

C. This Court has already recognized the importance of the Sentencing Commission's coordinating role in creating sentencing policy 22

D. The *Chapman* Court did not have an opportunity to draw upon the experience of the Commission to integrate this mandatory minimum penalty statute into a comprehensive sentencing policy 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 12

Braxton v. United States, 500 U.S. 344 (1991) 24

Chapman v. United States, 500 U.S. 453 (1991) .... *passim*

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11, 12, 13, 14, 15

Crandon v. United States, 494 U.S. 152 (1990) 12

Lechmere v. NLRB, 502 U.S. 527 (1992) 13, 14

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 13

Skidmore v. Swift & Co., 323 U.S. 124 (1944) 17

Stinson v. United States, 508 U.S. ___, 113 S.Ct. 1913 (March 24, 1993) 10, 23

United States v. R.L.C., 503 U.S. 291 (1992) 22, 23

United States v. Irvin, 2 F.3d 72 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1086 (1994) 24

United States v. Jones, 994 F.2d 456 (8th Cir. 1993) 24

United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) 19

United States v. Martinez, 987 F.2d 920 (2d Cir. 1992) 24

United States v. McFadden, 13 F.3d 463 (1st Cir. 1994) 24

United States v. Shabazz, 933 F.2d 1029 (D.C. Cir.), *cert. denied*, 502 U.S. 964 (1991) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 553 .....15, 17

18 U.S.C. § 3072(c) 23

18 U.S.C. § 3553(b) 10

21 U.S.C. § 841(b)(1) 5, 8, 18, 21, 24, 25

28 U.S.C. § 991(a) 15

28 U.S.C. § 991(b)(1)(B), (C) 21, 22

28 U.S.C. § 994(a)(1) 10

28 U.S.C. § 994(h)(1)(A) 23

28 U.S.C. § 994(p) 15

28 U.S.C. § 994(w) 18

28 U.S.C. § 994(x) 15

28 U.S.C. § 995(a)(8)-(16) 19

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 5

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003(b) 22

MISCELLANEOUS

U.S.S.G. § 2D1.1(c) 6, 7

U.S.S.G. § 5G1.1 12

U.S. Sentencing Comm'n, *Guidelines Manual*, Appx. C, amendment 488 (Nov. 1994) 7, 16, 20

TABLE OF AUTHORITIES – Continued

Page

U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991) 12

U.S. Sentencing Comm'n, *1993 Annual Report* 18

U.S. Sentencing Comm'n, *1992 Annual Report* 20

H.R. Rep. No. 711, 103d Cong., 2d Sess. (1994) 22

H.R. Rep. No. 845, pt. 1, 99th Cong., 2d Sess. (1986) 10

132 Cong. Rec. 26761 (1986) (statement of Sen. Harkin) 9

58 Fed. Reg. 27148 (May 6, 1993) 15, 17, 21

57 Fed. Reg. 62832 (Dec. 31, 1992) 15, 20

1 Kenneth Culp Davis & Richard Pierce, Administrative Law Treatise § 6.3 (3d ed. 1994) 16

No. 94-9088

In The

Supreme Court of the United States

October Term, 1995

MEIRL GILBERT NEAL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

This amicus brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Both petitioner and respondent have granted amici consent to file this brief, and amici have filed the letters of consent with the Clerk of the Court.

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws. Thus, members of the NACDL have a vital interest in ensuring that federal sentencing statutes are construed in a manner that will allow sentencing courts to avoid imposing arbitrary and unjust sentences based on factors bearing no relation to proper sentencing purposes.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and advocacy work regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparity, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 30,125 members nationwide with chapters in 35 states. FAMM conducts sentencing workshops for its membership, publishes a newsletter,

serves as a sentencing clearinghouse for the media, and researches cases for pro bono sentencing litigation.

FAMM's fundamental mission is to compile individual case studies of lives affected by mandatory minimum sentencing, such as 18 year old Nicole Richardson's. Nicole's boyfriend was a small-time drug dealer targeted by undercover agents who called Nicole's house looking for him to complete an LSD sale. Nicole gave them her boyfriend's phone number, and her role in the conspiracy cost her 10 years of her life. Her boyfriend plead guilty and provided information that reduced his sentence to five years. If the Sentencing Commission's interpretation of LSD weight were applied in Nicole's case, she would serve 46 months. FAMM submits this brief on behalf of Nicole, and the thousands of other FAMM members, inmates, and their families who are directly affected by LSD sentencing laws.

SUMMARY OF ARGUMENT

The statute providing for mandatory minimum penalties for drug offenses based on the weight of LSD involved in a case applies when a "mixture or substance containing a detectable amount" of LSD reaches the designated weight. In 1991, this Court decided, in *Chapman v. United States*, 500 U.S. 423 (1991), that the statute requires sentencing courts to consider the combined weight of LSD and its carrier. The holding of the case did not reach the question of *how* courts should calculate the weight of the carrier.

The federal sentencing guidelines use this same statutory language ("mixture or substance") to determine the proper offense level for a drug sentence. Since 1993, the guidelines have assigned a uniform weight of 0.4 mg for each dose of LSD involved in a case, regardless of the literal combined weight of the drug and its carrier medium. Federal courts interpreting the mandatory minimum penalty statute should use the uniform weight approach adopted by the Commission rather than including the actual combined weight of the LSD and its carrier medium in each case. There are two reasons why courts should adopt this reading of the statute.

First, the selection of a method for calculating the weight of a "mixture or substance" under the statute is more a policy choice than a reading of statutory language or legislative history. The statutory language is susceptible of a number of readings on this question and the legislative history is silent. In this setting, this Court has often recognized the value of relying for guidance on the views of politically accountable administrative bodies. Although this Court may not be compelled in this case to defer to the views of the Sentencing Commission under the *Chevron* doctrine, it should nonetheless choose for itself to give great weight to the outcome of the Commission's public process for developing this amendment to the guidelines.

Second, this Court should embrace the Commission's reading of the statutory language because of the experience of the Sentencing Commission and its ability to create a comprehensive sentencing policy. The Commission has access to information about a wide range of drug sentences. This information gives the Commission the

best view of the potential problems when courts impose different sentences for LSD offenses involving an equal number of doses, but unequal weights because of the differing weights of the carriers. It also allows the Commission to assess the danger that some LSD offenders will receive longer sentences than offenders involved with comparable amounts of more dangerous drugs. Both Congress and this Court have recognized the central coordinating role of the Commission in creating a comprehensive federal sentencing scheme. This Court should interpret the statute to fit best with the sentencing guidelines.

ARGUMENT

I. THE SENTENCING COMMISSION'S INTERPRETATION OF THIS STATUTORY LANGUAGE REFLECTS A POLICY DETERMINATION DESERVING JUDICIAL DEFERENCE

In 1986 the Congress passed a statute, now codified as part of 21 U.S.C. § 841(b)(1), creating mandatory minimum sentences for crimes involving specified amounts of lysergic acid diethylamide (LSD) and several other controlled substances. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The sentences apply in cases involving certain weights of a "mixture or substance containing a detectable amount" of the controlled substance.

When the United States Sentencing Commission created its initial set of sentencing guidelines in 1987, it incorporated the language from 21 U.S.C. § 841(b)(1) into § 2D1.1 of the guidelines, dealing with punishments for

drug offenses. The "drug quantity table" of § 2D1.1(c) sets offense levels according to the weight of the controlled substance involved in a case, and states that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1(c). An application note to the guideline states that " '[m]ixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." U.S.S.G. § 2D1.1(c), comment. (n. 1).

The 1987 set of sentencing guidelines gave no special guidance for calculating the weight of LSD, even though the carrier medium used with LSD functioned differently from the diluting agents used with some other controlled substances. Unlike drugs such as heroin, which are sold by weight (including the weight of any diluting agent), LSD is commonly sold by dose, regardless of weight. Hence, the literal combined weight of the LSD together with its carrier does not indicate the number of possible sales, or any other measure of real harm.

Things stood at this point when this Court decided *Chapman v. United States*, 500 U.S. 453 (1991). The question presented in that case was whether the weight of a carrier medium for LSD should be excluded from the "mixture or substance" under the statute defining eligibility for a mandatory minimum sentence. The Court, after noting that the Sentencing Commission had not addressed the question, decided that the weight of the LSD carrier medium should not be excluded from the calculation, because the LSD is to some extent "mixed" with the carrier. Id. at 461-62.

In 1993, the Sentencing Commission turned its attention to the special difficulties of calculating the relevant weight of LSD. Amendment 488 to the guidelines assigned a uniform weight, 0.4 mg, to each dose of LSD. This weight accounted both for the weight of the LSD itself, estimated to be about 0.05 mg, and for a standardized carrier medium. United States Sentencing Commission, *Guidelines Manual* § 2D1.1, Appx. C, amendment 488 (Nov. 1994).

Because LSD is sold in carrier media of different weights (blotter paper, sugar cubes, liquids, and so on), the uniform weight per dosage under the new guideline commentary would not reflect the actual weight of the LSD and its carrier in every case. However, the Commission adopted its uniform weight to eliminate disparities among LSD offenders with the same number of doses but different actual weights, and to eliminate the disparities between LSD offenses and offenses involving comparable amounts of other controlled substances. As the commentary to the amendment explains: "Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level." U.S. Sentencing Comm'n, *Guidelines Manual*, Appx. C, amendment 488 (Nov. 1994).

A. Congress did not select a particular method for calculating the weight of the carrier medium for LSD.

The mandatory minimum sentence statutes for LSD resolve some questions about the relevant amounts of the drug, but not others. The statutes, 21 U.S.C. §§ 841(b)(1)(A)(v) and 841(b)(1)(B)(v), apply to offenses involving at least 10 grams and at least 1 gram, respectively, of "a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." In comparison, the mandatory minimum sentence statutes for a few other controlled substances address both the pure form of the drug and a "mixture or substance containing a detectable amount" of the drug. See, *e.g.*, 21 U.S.C. § 841(b)(1)(A)(iv) ("100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)").

The clear meaning of this language indicates that a sentencing court cannot consider the weight of LSD alone, without assigning any weight to its carrier. Such a reading would convert the statutory language "mixture or substance" into surplusage. It would also ignore the difference between the sections covering LSD and the sections covering other drugs such as PCP, which give alternative weights for the pure form and the diluted form of the drug. The LSD provision offers no alternative for sentencing based on the weight of the pure drug, and reading such an alternative into the statute would change its meaning. The Court in *Chapman v. United States*, 500 U.S. 453, 468 (1991), concluded on the basis of these arguments that "the statute requires the weight of the

carrier medium to be included" when a court determines the proper sentence for trafficking in LSD.

Although the statutory language makes it clear that a sentencing court must consider the weight of the carrier in LSD cases, it does not specify *how* the court should calculate the weight. Courts might choose to consider the actual gross weight of the drug and the carrier in each case, but the statute does not explicitly give such instructions. Alternatively, a court might consider the weight of only some portion of the carrier – for instance, the portion of a single section of blotter containing the LSD. The court might choose from a variety of techniques for detecting LSD in a mixture or substance, each with different capacities for detecting small amounts of the drug. Or a court might choose, as the Sentencing Commission has chosen here, to assign a presumptive uniform weight to the carrier based on the number of doses, since LSD is sold by the dose rather than by weight.

Each option makes sense of the statutory language, "10 grams or more of a mixture or substance containing a detectable amount" of LSD. Each gives the most severe sentences to the offenders involved with the largest amounts of LSD, and each recognizes that carriers are necessary for street-level sales of the drug.

The legislative history provides no additional guidance on the question of how to calculate the weight of LSD under the statute. The specific references to LSD in the legislative history do not mention the issue. *See* 132 Cong. Rec. 26761 (1986) (statement of Sen. Harkin). A recurring theme in the legislative history is Congress' desire to adopt a "market-oriented" penalty structure,

one that punished drug trafficking for amounts of drugs as they are sold, rather than amounts of pure controlled substances. H.R. Rep. No. 845, pt. 1, 99th Cong., 2d Sess. 11-12, 17 (1986). A number of methods of calculating weight might further that purpose. The choice among those methods does not turn on the language of the statute, or its legislative history. It turns on the interpreter's views of wise and effective sentencing policy. A court would have to engage in a legal fiction to make such a choice and impute it to Congress.

B. Federal courts should look to administrative bodies with delegated policymaking authority for guidance on statutory construction questions that amount to policy choices.

The U.S. Sentencing Commission's interpretation of the statutory phrase "mixture or substance" for use in setting LSD offense levels under the sentencing guidelines is a policy determination Congress delegated to this agency, just as it delegates the finer points of policymaking authority to other agencies. Under 28 U.S.C. § 994(a)(1), the Commission has the power to establish guidelines that courts must use, unless the guidelines conflict with a statute or the Constitution, or the court uses its statutory departure power. *See* 18 U.S.C. § 3553(b). As this Court stated in *Stinson v. United States*, 508 U.S. ___, 113 S. Ct. 1913, 1919 (March 24, 1993), "[t]he Sentencing Commission promulgates guidelines by virtue of an express congressional delegation of authority for rulemaking. . . . Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies."

Because some agency interpretations of statutes amount to policy decisions, federal courts must accept that reading of the statute under some circumstances. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court compelled lower federal courts to defer to reasonable agency constructions of the statutes they administer, so long as Congress has left a range of choices open to the agency:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. The *Chevron* Court insisted on deference to these statutory constructions because of the political accountability of federal agencies. The Court concluded that those officials that the President appoints for limited terms are in a better position than judges to

> make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. at 865-66. Some lower courts have invoked the *Chevron* doctrine in upholding sentencing guidelines when they have been challenged as inconsistent with a sentencing statute. See *United States v. Shabazz*, 933 F.2d 1029,

1035 (D.C. Cir.) (Thomas, J.), *cert. denied*, 502 U.S. 964 (1991).

The mandatory deference required of federal courts under the *Chevron* doctrine may not, strictly speaking, apply to this Commission decision. First, the *Chevron* doctrine applies only to statutory constructions by an "agency charged with the administration of the statute in light of everyday realities." 467 U.S. at 866. The Sentencing Commission does not have primary responsibility for administering mandatory minimum statutes; sentencing courts do. While it could be said that the Commission has primary responsibility for "administering" most sentencing statutes and developing policy within the statutory framework, its responsibility for administering mandatory minimum statutes is more problematic. Mandatory minimum statutes create an ad hoc deviation from the proportionate sentences available in a guideline system. They empower courts to ignore the dictates of the sentencing guidelines. U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 26-34 (August 1991). The guidelines themselves contemplate that sentencing courts, when reading a mandatory minimum statute or any other sentencing statute in conflict with the guidelines, will follow the statute rather than the guideline. U.S.S.G. § 5G1.1(a), (b). *Compare Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (*Chevron* deference does

not apply to prosecutorial interpretation of criminal statute, no agency has specific responsibility for administering criminal statute).

Second, *Chevron* may not fully apply to this Commission decision because the Commission was interpreting statutory language that courts had interpreted independently before the agency reached its present position. This Court decided *Chapman v. United States*, 500 U.S. 453 (1991), nearly two years before the Commission explicitly addressed the special problems of measuring the weight of LSD. In somewhat similar contexts, this court has stated that *stare decisis* gives an interpreting court the discretion to ignore the agency's later different reading of a statute, at least if the existing judicial reading of the statute was independent and longstanding. See *Lechmere v. NLRB*, 502 U.S. 527 (1992) (reaffirming longstanding judicial reading of union election statute despite recent contrary reading by NLRB); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (reaffirming longstanding judicial reading of rate regulation statute despite recent conflicting reading of statute by ICC).

On the other hand, there are reasons to believe that this second limitation on *Chevron* does not apply here. The *Chapman* Court's reading of this statutory language cannot be said to be longstanding; no institutional practices or private conduct have built up in reliance on the opinion. Further, even though *Chapman* addressed the same statutory language involved in Amendment 488 to the guidelines, the Court was not addressing precisely the same question as the Commission. The precise holding of *Chapman* is that the sentencing court must include the weight of the carrier medium: "We hold that the

statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." 500 U.S. at 468. Only in dicta did this Court suggest that the "entire" weight of the carrier must be included. Id. at 459. Viewed in this light, the Commission may have answered a different question about the statutory language than did the holding in *Chapman*. Thus, the *Lechmere* limitation on deference to statutory interpretations by administrative agencies may not apply.

Even if *Chevron* does not compel federal courts to accept any reasonable Commission reading of the statutory language, the courts should still choose for themselves to adopt the Commission reading of the statutory language here. Where the statutory language or legislative history makes the choice, an agency's views add nothing. And where there is no available agency view of the statutory question (as was the case for this statute at the time of the *Chapman* case), the Court must make the choice alone. But when Congress has left several options open under the statutory language, and an administrative body has expressed its view about the best way to implement the language consistent with congressional purposes, the federal courts should give that agency view of the statutory language a presumption of legitimacy, even if the agency's reading is not strictly binding on the courts.

The Sentencing Commission is a politically accountable body (at least in comparison to federal courts) that has adopted language from a statute within its area of delegated responsibility for use in a guideline. The President appoints the seven members of the Sentencing Commission with the advice and consent of the Senate;

commissioners serve terms of six years. 28 U.S.C. § 991(a). The topic of Amendment 488 was the subject of a preliminary notice in the Federal Register, and was part of the agenda of a public meeting. 57 Fed. Reg. 62832 (Dec. 31, 1992). The text of the amendment and an explanation of the proposal appeared later in the Federal Register, along with an invitation for interested parties to submit comments to the Sentencing Commission. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). This process was required under the notice-and-comment rulemaking procedures of 5 U.S.C. § 553, imposed on the Sentencing Commission under 28 U.S.C. § 994(x). The Commission also submitted Amendment 488 to Congress, as part of a package of amendments, six months before its effective date. 58 Fed. Reg. 27148 (May 6, 1993); *see* 28 U.S.C. § 994(p).

This is not to say that every pronouncement of the Sentencing Commission about statutory words and phrases should carry weight with courts interpreting those statutes. But here, the Commission made a reasoned policy determination about how best to reconcile this statute with other statutes in the area and with the sentencing guidelines. To the extent that the Court does not follow the Sentencing Commission's reading of the statute in setting mandatory minimum sentences, the Commission's use of the statutory phrase "mixture or substance" in its guideline will have an impact on the sentence in fewer LSD cases. It will leave a larger gap in the guidelines' coverage.

Whether or not the literal dictates of *Chevron* apply here, many of the reasons supporting that doctrine of

judicial restraint and deference are present. Where Congress has passed a statute allowing for a range of policy choices, the political accountability of an administrative body such as the Sentencing Commission should weigh in favor of its policy choice.

II. THE EXPERIENCE OF THE SENTENCING COMMISSION AND ITS ABILITY TO COORDINATE SENTENCING POLICY MAKE IT THE BEST SOURCE OF GUIDANCE FOR A COURT INTERPRETING THIS SENTENCING STATUTE

If the fact that the Commission has exercised delegated power in its reading of this statutory language does not convince this Court to adopt the Commission's view, the Court still might treat the amended guideline as an "interpretive" rule. Interpretive rules are rules that do not have the force of law. 1 Kenneth Culp Davis & Richard Pierce, Administrative Law Treatise § 6.3 (3d ed. 1994). The agency passing the interpretive rule may wish to clarify the meaning of a statute without binding itself or imposing new obligations on the public. Courts do not consider themselves bound by interpretive rules of agencies, but they nonetheless give the rules close consideration during any interpretation of the relevant statute. Id. at 241-47. Similarly, although the Commission's amended guideline has a binding effect on guidelines calculations, this Court might only treat it as a potential source of guidance on how to apply the mandatory minimum statute.[1]

---

[1] The analogy between interpretive rules and the Sentencing Commission action in passing Amendment 488 is not perfect, because Amendment 488 traveled through the full notice-and-comment process of the Commission. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). Interpretive rules do not go through the notice-and-comment process. 5 U.S.C. § 553. Further, the Sentencing Commission intends to bind sentencing courts to this reading of the statute for the limited purpose of setting offense levels for guideline sentences. Nonetheless, the imperfect analogy to interpretive rules serves a limited purpose. It offers guidance about how courts should regard an agency action they do not consider binding.

The key case regarding interpretive rules is *Skidmore v. Swift & Co.*, 323 U.S. 124 (1944). Under the Fair Labor Standards Act of 1938, Congress gave the Administrator the power to enforce the statute, but did not grant any power to create legislative rules to fill in the gaps of the statute. The Administrator announced his interpretations of the statute in "interpretive bulletins," offering notice to employers and others of the agency's enforcement priorities and positions. Although the federal courts were not bound by the interpretive bulletins in determining the meaning of the statute, the Supreme Court still considered them valuable guidance:

> [Interpretive bulletins] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140.

The experience of the Sentencing Commission in matters relating to punishment for drug offenses, together with its careful consideration of the issue of measuring the weight of LSD and carriers, give Amendment 488 "the power to persuade." Even though the Commission used the statutory language to create a related guideline rather than to control the imposition of mandatory minimum sentences, the Court should avail itself of the Commission's experience and careful effort to reach the best interpretation of 21 U.S.C. § 841(b).

A. The Commission's responsibility to monitor all federal sentences for drug offenses puts it in a unique position to guard against unfair disparities in sentences.

The Sentencing Commission has the statutory authority to collect information about every criminal sentence handed down in the federal courts. The Commission must review the presentence report, the guideline worksheets, the court's sentencing statement, and any written plea agreement for every federal criminal sentence. *See* 28 U.S.C. § 994(w). The Commission exercises that authority to develop an extensive database of cases. It uses that information in its efforts to adjust and improve the sentencing guidelines. U.S. Sentencing Comm'n, *1993 Annual Report* 5-12 (1994) (reviewing guideline amendment process and role of working groups).

The data available to the Sentencing Commission makes it possible for the Commission to identify and prevent unwarranted disparities among LSD offenders. Under the statute, one LSD offender with a large number

of doses on a light carrier (or no carrier at all) may receive a lower sentence than the LSD offender with a small number of doses on a much heavier carrier. Because LSD is sold by the dose, there is no moral difference between LSD offenders based on the type and weight of the carrier they choose. See *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J.).

A court would be able only to speculate about hypothetical injustices under the statute. The Commission, on the other hand, has the data to make a realistic prediction about which injustices are most likely to occur for LSD offenses, and how often. Similarly, the Commission has the capacity to collect and create data on the social harms of controlled substances other than LSD. It also can draw on the experience of probation officers and law enforcement agencies. 28 U.S.C. § 995(a)(8)-(16). On the basis of this information, the Commission can judge the relative blameworthiness of LSD offenders and offenders involved with other drugs, and adjust the guidelines accordingly.

The Commission relied on just such a comparison to other illicit drugs as a reason to support its uniform 0.4 mg weight for each dose of LSD:

> [T]he weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. . . . Thus, the approach

> decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances. . . .

U.S. Sentencing Comm'n, *Guidelines Manual*, Appx. C, amend. 488 (Nov. 1994).

The Commission's ability to collect data year in and year out also gives it the opportunity to adjust the sentencing calculations for LSD and other controlled substances as marketing techniques evolve. Since Congress attempted to create "market-oriented" sentences for drugs, *Chapman*, 500 U.S. at 461, interpretations of the punishment statute ought to reflect, to the extent possible, changes in the marketplace. The Commission is best situated to identify and suggest such changes in interpretation. Indeed, the Commission has created several "working groups" for various aspects of its drug sentencing guidelines, and the working groups have assembled empirical and legal research regarding drug sentences. See U.S. Sentencing Comm'n, *1992 Annual Report* 9 (1993). That research is available to commissioners, commission staff, or members of the public interested in commenting on or proposing a guideline amendment. *See* 57 Fed. Reg. 62832 (Dec. 31, 1992).

The Sentencing Commission has, on this particular subject, exercised its responsibility to research the effects of LSD and to monitor sentencing practices for LSD cases. In December 1992, the Commission published amendments to the LSD guidelines proposed by the Legislative Subcommittee of the Federal Defenders. Those proposals would have eliminated any consideration of the weight of an LSD carrier in calculating a base offense level under the guidelines. 57 Fed. Reg. 62832, 62853 (Dec. 31, 1992).

The Commission held a public hearing on these proposed amendments on March 22, 1993. 58 Fed. Reg. 27148 (May 6, 1993). It then amended the proposal to account for this Court's ruling in *Chapman* and to recognize that the weight of other drugs is calculated by including the weight of inert diluting agents. In April 1993, the Commission submitted the revised amendments to Congress, and the changes did not take effect until November 1, 1993. 58 Fed. Reg. 27148, 27155-56 (May 6, 1993). While the Sentencing Commission does not adequately develop its expertise or explain its choices in all areas, it has done both for Amendment 488. A court construing the ambiguous provisions of 21 U.S.C. § 841(b)(1) could not conduct such surveys, or benefit from the input of so many experienced groups.

B. A coordinating role for the Commission is especially important in sentencing, where Congress emphasized an integrated approach.

The information available to the Sentencing Commission, and the expertise it has developed in LSD sentencing policy, make it possible for the Commission to coordinate sentencing policy in this area. This is precisely the role Congress assigned to the Commission under the Sentencing Reform Act. One purpose of the Commission is to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Its sentencing policies must also "reflect, to

the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

In passing more recent sentencing statutes, Congress has continued to recognize the importance of the Sentencing Commission in integrating various statutes into a comprehensive sentencing policy. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003(b); H.R. Rep. No. 711, 103d Cong., 2d Sess. 388-89, 391, 392 (1994).

C. This Court has already recognized the importance of the Sentencing Commission's coordinating role in creating sentencing policy.

This Court has decided several cases recognizing that courts, when interpreting sentencing guidelines and statutes, need to consider the Sentencing Commission's central role in the creation and coordination of federal sentencing policy. The most important of the cases, *United States v. R.L.C.*, 503 U.S. 291 (1992), directly addresses the responsibility of courts to read statutes in a manner that integrates best with the comprehensive guideline system.

In *R.L.C.*, a juvenile member of the Red Lake Band of Chippewa Indians was convicted of involuntary manslaughter for killing a person in an automobile crash. If R.L.C. had been an adult, the statutory maximum for his crime would have been three years; the maximum prison term under the sentencing guidelines would have been 21 months. The statute covering juvenile detention limits any period of detention to the "maximum term of imprisonment that would be authorized if the juvenile

had been tried and convicted as an adult." 18 U.S.C. § 3072(c). This Court decided that the maximum term "authorized" was the top of the applicable guideline range rather than the longer statutory maximum for involuntary manslaughter. 503 U.S. at 308.

This result made it possible to treat as many cases as possible in a manner consistent with the sentencing guidelines. The Court concluded from the statutory language and legislative history that Congress wanted to integrate juvenile and adult sentences to the extent possible. To do that would require the Court to apply the upper guideline range rather than the statutory maximum:

> The most fundamental of the Sentencing Reform Act's changes was, of course, the creation of the Sentencing Commission, authorized to promulgate the guidelines required for use by sentencing courts. It hardly seems likely that Congress adopted the current [juvenile sentencing statute] with a purpose to conform juvenile and adult maximum sentences without intending the recently authorized Guidelines scheme to be considered for that purpose.

503 U.S. at 305.[2]

---

[2] *Stinson v. United States*, 508 U.S. ___, 113 S. Ct. 1913 (1993), deals with a related but distinct issue. That Court concluded that "[c]ommentary which functions to interpret a guideline or explain how it is to be applied controls." Id. at 1918 (citation, quotation marks and brackets removed). Even though the commentary in this case dealt with a phrase drawn from a statute ("crime of violence," from 28 U.S.C. § 994(h)(1)(A)), the decision dealt with the power of *commentary* to influence a court's reading of a guideline, not the Commission's power through a

Lower courts have followed the lead of this Court in reading statutes and guidelines commentary in a way that reinforces the basic structure of the sentencing guidelines. Several courts have addressed the question of whether, under 21 U.S.C. § 841(b), the penalties for crimes "involving" certain amounts of controlled substances should be determined according to amounts covered by conspiracy charges, or instead should include only "relevant conduct" within the meaning of the guidelines. They have concluded that a sentencing court should only include amounts proven at sentencing as relevant conduct, within the meaning of the sentencing guidelines, and not the amounts that might be attributed to the defendant under conspiracy law. These courts have concluded that the use of the relevant conduct concept from the guidelines provided the best reading of the statutory language because it integrated more sentences into a comprehensive approach. The courts chose to follow the Commission's lead on this question even though the Commission had not specifically attempted to interpret the statutory language (crimes "involving" designated amounts of drugs). *See United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1086 (1994); *United States v. Jones*, 994 F.2d 456 (8th Cir. 1993); *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1992); *see also United States v. McFadden*, 13 F.3d 463, 466 (1st Cir. 1994)

---

guideline to influence a court's reading of a statute. *See also Braxton v. United States*, 500 U.S. 344 (1991) (recognizing special role of Commission in resolving lower federal court disagreements over meaning of particular guidelines, but not addressing Commission influence in judicial interpretation of sentencing statutes).

(Breyer, C.J., dissenting) (arguing that mandatory minimum penalty statute for persons who "use" firearms during drug trafficking offense should be construed narrowly to allow wider range of cases to fall within guidelines on same issue).

D. The *Chapman* Court did not have an opportunity to draw upon the experience of the Commission to integrate this mandatory minimum penalty statute into a comprehensive sentencing policy.

The need to coordinate the mandatory minimum penalty statute, 21 U.S.C. § 841(b), with the sentencing guidelines was not an issue in *Chapman v. United States*, 500 U.S. 423 (1991). At that point, the guidelines merely restated the statutory language and offered no additional guidance to sentencing courts. This Court faced the question of whether the sentencing court should exclude the weight of the carrier entirely from its calculation, and answered it as the statutory language required.

In dicta, the opinion also mentioned that a sentencing court should consider the "entire" weight of the carrier. But since *Chapman*, the Sentencing Commission has spoken to this separate question of how a court should calculate the weight of the carrier in a "mixture" of LSD. The Court may now choose the interpretation of the statute that best integrates this statute with the comprehensive scheme of sentencing Congress hoped to achieve. To the extent that statements in the *Chapman* case are inconsistent with this interpretation, this Court should disavow them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PETER GOLDBERGER*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

RONALD F. WRIGHT
Wake Forest University
School of Law
P.O. Box 7206
Winston-Salem, NC 27109
(910) 759-5727

BARBARA E. BERGMAN
University of New Mexico
School of Law
1117 Stanford, N.E.
Albuquerque, NM 87106
(505) 277-3304

Attorneys for Amici Curiae

*Counsel of Record

September 20, 1995